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No. 94-1187

In The

Supreme Court of the United States

October Term , 1994

JOHN PHILLIP SMITH, M.D.

Petitioner,

vs.

WILLIAM B. RICKS M.D.,

et al.

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ATTORNEYS WHO APPEAR BEFORE THE UNITED STATES COURTS OF APPEALS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a merits panel believes the conduct of counsel justifies a sanction under Federal Rule of Appellate Procedure Rule 38, should the following rights obtain:

1. The right to a specific notice providing a detailed statement of the alleged offensive conduct indexed to the record for clear reference,
2. The right to a specific response including the right to present fact and expert testimony,
3. The right to a neutral review board to hear the sanction, and
4. Should the foregoing rights be accorded in all cases, or only in those when the sanction exceeds $750 or a similar sum above the ethics reporting threshold of state bar associations?

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BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

It is extremely difficult for physicians, who are subject to adverse peer review decisions, to find competent counsel who are willing to undertake representation of them in these matters. For the affected physician, an adverse peer review decision is an economically devastating event because

the physician's main source of income is either severely reduced or cut-off entirely.

Such a physician requires a forceful, effective, creative and competent advocate. The chilling effect of the decision of the United States Court of Appeals for the Ninth Circuit in the instant case, removes the incentive for counsel to undertake such representation and places the remaining assets of the physician at risk. It is a prescription for bankruptcy and economic disaster for both client and counsel.

Unlike the Sherman Anti-Trust Act, which has over one hundred years of judicial gloss, including numerous cases of this court, the Health Care Quality Improvement Act of 1986 is new, with broad language and few uniform judicial decisions. This court has yet to address many of the issues which the Act presents. Thus, if the decision in the case *sub judice* is allowed to represent the law, only those physicians who can afford to hire large and wealthy law firms will find representation. The small law firm or solo practitioners will not expose themselves to a potentially career endings sanction, either economically or by way of

discipline.

The author of this petition and supporting brief is an attorney in a two person firm that has specialized, over the last nineteen years, in representing physicians throughout the United States in staff privilege matters, including both adverse peer review decisions, failure to be given staff privileges, economic credentialling, and exclusive contract disputes. Our hourly rate, while substantial for our firm size and locale, is considerably less than that charged by large and medium sized firms that generally defend these matters on behalf of physicians and hospitals. The practical effect of the decision from which a Writ of Certiorari is sought, is to raise the cost of legal services to those physicians who can at least afford it, and to eliminate or greatly reduce competition in the field of legal services in this area of the law. It does not tilt the level of the playing field in favor of the hospital and its staff members, whose legal fees are being paid by the hospital or an insurance company. Instead, it eliminates the playing field.

FACTUAL BACKGROUND

A. THE FEE SHIFT

Amicus has evaluated the rule 56 FRCP Summary Judgment which granted immunity. We found an adequate factual response to question the entry of that order. Dr. Smith's counsel defended that motion with factual materials of a type Weisberg & Aronson characterized as commonly asserted violation of due process set against industry guidelines written by the conservative American Hospital Association's Task Group. That position appears to be reasonable, not "frivolous." It does not justify the fee shift against Dr. Smith.

Mr. Berg has protested that he never argued that the Court of Appeals should apply various state law decisions and professional guidelines *"in place of the text of the HCQIA"* as charged by the 9th Circuit's opinion (see Appendix to the petition at 21a).

As trial and appellate attorneys *amicus* is put in fear by Smith that a new and expanded application of FRAP 38 now published makes the usual practice of our profession an ultra hazardous activity to our families. We cannot function

as we did before in the normal exercise of our profession duties without fear of unfounded sanctions.

Amicus is mindful that the § 11113 fee shift against Dr. Smith was based on a *sua sponte* assessment by the District Court that he had not produced "direct evidence" of conspiracy -- an issue about which Dr. Smith got no notice, and which the 9th Circuit Court of Appeals did not reverse although it did clarify that conspiracy need not be proved by "direct evidence", but Mr. Berg's client got no benefit from the reversal on this point because the fee shift was not set aside.

Amicus is sensitized to the attorney's effort in the case to obtain for himself 9th Circuit General Order 10.9 proceedings and to have the sanction against him evaluated by a neutral forum not the panel which decided his client's case.

SUMMARY OF THE ARGUMENT

This case presents facts which go far beyond the published literature to sanction litigant and lawyer for litigating what appears to be commonplace contentions

reasonably presented. What is revealed here is the potential for fee shifting and abuse of FRAP Rule 38 which can be tempered if customary due process is required.

ARGUMENT

A. INTEREST OF THE AMICUS

Attorneys are all at risk of devastating sanctions. Fear of sanctions can be an inspiration for intellectual cowardice. Litigants who confront fee shifting statutes are in equal fear. In response to a proposed fee shifting statute (S243) this Spring, active members of the litigation section of the American Bar Association called such a statute "a regressive tax on the right to litigate." As a result of the ABA's attention the proposed statute will be modified. That protects future litigants but does nothing for those who seek to litigate fair procedure and monopolization in the health care system where about 15% of the gross domestic product is spent.

On the lawyers' behalf, Rule 11 of FRCP has recently been modified to require notice and to allow procedures to avoid sanctions by withdrawing improper pleadings. FRAP

38 has not been modified, but it should be interpreted as suggested in Cooter & Gell v Hartmax (1990) 496 US 384, 110 S.Ct. 2447, 2460:

> "[t]he issues involved in determining whether an attorney has violated Rule 11 . . . involve fact-intensive close calls."

The sanction should be reserved for "an abusive pleading or motion." Pavelic & Le Flore v Marvel Entertainment Group 493 U.S. 120,122,110 S.Ct. 456, 458 (1989). The sanctioned conduct must be done "unreasonably and vexatiously."

B. State Bar Report

California Business & Professional Code §6068(o)(3) requires Mr. Berg to report any substantial sanction under Rule 11 or FRAP 38 to his state bar. Most states have similar requirements. This burden requires an appeal which adds to the work of the appellate courts because it must be taken immediately. Union Oil, Inc. v E.F. Hutton & Co. (9th Cir. 1986) 809 F. 2d 548, 556. The chilling effect of state bar reporting has been cited in "Sanctions Under Amended

Federal Rule 11 ...." 74 *Georgetown* L.R. 1313,1352, note 249. The misfortune of such appeals is the satellite litigation required under the circumstances which doesn't help resolve the dispute between the parties. See Jensen Elec. v Moore, Caldwell, Rowland & Dodd (9th Cir. 1989) 873 F.2d 1327, 1330 (dissenting opinion by J. Schroeder).

C. Sanction Proceeding Requires Notice

FRAP 38 sanctions applied without notice raise serious due process questions. See the comment of the Committee of Federal Courts, Association of the Bar of the City of New York, "Procedural Rights of Attorneys Facing Sanctions," (1985) 40 The Record 313, 315-316 cited in *Federal Practice and Procedure* (West 1990) at volume 5A, page 32. Also see Miranda v Southern Pacific Transportation Co. (9th Cir. 1983) 710 F.2d 516, 522.

In this case there is a serious failure of "notice" and a real possibility that the Court of Appeals cited Mr. Berg for making an argument he in fact never made.

D. Punishments for Other Acts

Wright and Miller's *Federal Practice & Procedure* Vol 5A page 41 repeats the comment in 37 *Vill.L.Rev.* 575, 635 and 635 that after a finding on the merits of a case the losing attorney may find himself disadvantaged by a sanction because the court (or its staff) has a dislike for the critic of its decision.

E. Due Process

Amicus suggest that this court grant certiorari to review the FRAP Rule 38 toward the end that due process be structured according to the following suggested standards:

a. <u>The Quality of the Notice</u>

When a sanction is contemplated the attorney should get clear notification of the specific fact/law issue which the court has identified as a possible basis for a sanction. The notice should be referred to the specific document and page(s) where the offensive act appears. It's noteworthy that with all Mr. Berg's motion (which appear on the docket) no

response identified where he argued that the Court of Appeals "should apply various state law decisions and professional guidelines *in place of the text of* the HCQIA" as charged by the opinion. Compare the 9th Circuit's General order 10.9 which was *not* followed in this case.

b. Right to Respond

i. Not Within the Case

The attorney's response should not be integrated with the client's briefs -- because it imposes a conflict of interests on the attorney and results in the temptations to:

1. exculpate himself within the limited space in briefs -- depriving the client of full use of that space for the client's arguments, and

2. distort the case by emphasizing issues not

important to the client but very personal to the lawyer.

ii. Attorney Right to a Defense -- Including Expert Witnesses

A response should allow the attorney to produce expert witness statements and the type of materials used in a Rule 11 defense that this is an effort to expand the law.

c. Neutral Determination

After a sanction is proposed the issues should be referred to a neutral panel for trial to isolate the sanction grievance from case issues. The following procedures should be required:

1. Burden of proof.

A "clear and convincing" burden is suggested.

2. Finding of fact

A factually detailed finding of fact should be required if discipline is imposed including discussion of the defense of exculpatory value of unique issues in the case or the reference to common law spouses if there is an untested statute such as we find here.

CONCLUSION

The fee shift under § 11,113 of the statute was totally misapplied and worse, it was given without notice. No reported opinion is comparable.

The FRAP Rule 38 sanction in this case is not appropriate.

This court should grant certiorari to establish due process patterns for use of the fee shift and for the appellate court's sanction power.

Date: March 6, 1995 _____

LOUIS H. MARKOWITZ, ESQ.